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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

## No. 1131

GALE H. JOHNSON,

*Petitioner,*

vs.

JOHN E. BENNETT, Warden, Iowa State Penitentiary,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## BRIEF FOR RESPONDENT.

### OPINION BELOW.

The orders of the United States District Court, Southern District of Iowa, are found at A. 38 and A. 57 and are not officially reported. The opinion of the United States Court of Appeals for the Eighth Circuit appears at A. 71, and is reported at 386 F.2d 677 (1967).

## JURISDICTION.

The judgment of the United States Court of Appeals was entered on November 28, 1967. Petition for writ of certiorari was filed on February 19, 1968, and certiorari was granted April 1, 1968. The jurisdiction of this court is invoked under 28 U. S. C., Section 1254(1).

## CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Constitution of the United States, Article XIV, Sec. 1: "No state shall make or enforce any law which will abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 13880, Iowa Code (1931): "Defense witnesses at expense of state. Witnesses for the defense shall be subpoenaed at the expense of the county only upon the order of the court or judge thereof before which the case is pending, made upon a satisfactory showing that the witnesses are material and necessary for the defense, which order may be made at the time of the trial or other disposition of the case. The board of supervisors shall not allow any claims for fees of witnesses not thus authorized."

## QUESTIONS PRESENTED

Did the incorrect subpoena return which prevented a purported defense impeachment witness from testifying at petitioner's trial constitute a violation of due process?

Should a conviction be overturned because of due process violation where the opinion testimony supporting

the state's introduction of inculpatory notes in 1934 is disputed by more recent opinion?

Does a state have the constitutional right to require a defendant choosing the defense of alibi to accept a limited burden of proof apart from the constant burden on the state to prove guilt beyond a reasonable doubt in order to obtain a conviction?

## STATEMENT

Petitioner Gale H. Johnson was arrested on May 30, 1934, for the murder three days earlier of a Burlington, Iowa police captain (Original Transcript Record, hereafter referred to as T.R. 110, and Federal Habeas Corpus Evidentiary Hearing, hereafter referred to as H.R. 28). The Grand Jury returned an indictment for the crime of murder. (A. 84). On November 7, 1934, the petitioner was served with Notice of Additional Testimony informing him of certain notes purported to have been written by him while awaiting trial which would be offered in trial with the testimony of witnesses not present before the Grand Jury. (A. 87). The petitioner was represented by legal counsel, Mr. Doran and Mr. Finley, at that time and during trial. (A. 63, 91; H.R. 30).

Subsequent to a plea of not guilty, the petitioner's trial commenced on November 13, 1934. (T.R. 3). On November 16, 1934, the petitioner took advantage of an Iowa statute which provided for defense witnesses to be subpoenaed at the expense of the state by requesting fourteen or fifteen witnesses (the name May Vance was listed twice). (A. 92). After the court ordered the witnesses subpoenaed, the sheriff's return indicated that all had been served except Thomas Orsucci who was "in Clarinda institution for Insane." (Pet. Ex. 3, A. 125). Scant reference to Orsucci is found during the remainder of the trial. (T.R. 58, 310).

The petitioner's defense at trial was that he was in Des Moines, Iowa about the time of the murder and therefore could not have committed the offense in Burlington. Several of petitioner's acquaintances testified that he was in Des Moines on Saturday, May 26th (T.R. 247, 258) and on Sunday morning, the 27th, about the time of the murder (A. 103, 105). His wife and brother supported the contention (T.R. 255, 318). In contrast, the state presented testimony that petitioner was in Illinois on the 25th and 26th. (T.R. 143, 149). On the 26th, he had a sawed-off shotgun in his possession (T.R. 157). Deep contradictions resulted from the testimony of prison inmates regarding the source and purpose of the notes allegedly written by the petitioner. A defense witness named Yates categorically denied the state document examiner's testimony that petitioner had authored the notes in question (T.R. 309).

At the conclusion of the evidence and final arguments, the court presented twenty-four instructions to the jury, (T.R. 363-381) including the alibi instruction which is challenged herein. (A. 94; T.R. 374). On November 24, 1934, the jury returned a verdict of guilty of murder in the second degree, bypassing acquittal and the greater of the three possible penalties. (A. 97; T.R. 380). Petitioner's appeal to the Iowa Supreme Court was affirmed. *State* v. *Johnson,* 221 Iowa 8, 264 N.W. 596, 267 N.W. 91.

Two or three years after the conviction, petitioner was surprised when he met Thomas Orsucci in prison and learned that he was in the Polk County Jail and not the Clarinda institution during petitioner's trial. (H.R. 34). In 1949, the petitioner acquired an affidavit from Orsucci which stated that he "had knowledge of certain facts pertinent to [petitioner's] defense" and that he still had said information and could "produce it if requested." (A. 33). Orsucci died in 1965 without any apparent attempt

to perpetuate whatever his testimony would have been. (A. 60; H.R. 25, 56).

Petitioner filed a petition for writ of habeas corpus in the Supreme Court of Iowa on January 4, 1966. (A. 13). The petition was denied on January 6, 1966. (A. 20). A petition was then filed in Federal District Court (A. 4) on February 16, 1966 and an Order to Show Cause was filed on February 18, 1966. (A. 21).

The various proceedings which followed included an evidentiary hearing. (A. 49). In that hearing, the petitioner alleged that Orsucci was subpoenaed in 1934 so that he could relate how one of the two witnesses that had identified the petitioner running from the scene of the murder had mistakenly identified Orsucci as his companion. (A. 60; H.R. 48). Testimony was presented on behalf of petitioner by an expert witness contesting the validity of the 1934 handwriting analysis which indicated the petitioner authored the inculpatory notes. Respondent's handwriting expert agreed with the opinion. (A. 62; H.R. 108, 197). These issues, along with the question of whether or not the "alibi" instruction given in petitioner's trial destroyed his presumption of innocence, were considered by the court and relief was denied. (A. 47). The decision of the Federal District Court was affirmed by the Court of Appeals. (A. 71).

## SUMMARY OF ARGUMENT

A. The uncontroverted use for which Thomas Orsucci was intended in the petitioner's trial was to show that one of the state's identification witnesses had previously identified him as the man fleeing the scene of the murder with the petitioner. To vitiate the conviction below based on due process violation, it is necessary that the evidence suppressed be favorable to the accused and material to his guilt or punishment.

The record below is free of any indication that the prosecuting attorney was responsible for the absence of the requested witness and no showing has been made that the erroneous return by a deputy sheriff in another part of the state was the product of mistake or malice. The materiality of the missing testimony did not reflect on the guilt or punishment of petitioner and was potentially unfavorable. The combination of acts and omissions by the petitioner over the many years since his trial represents his abandonment of any claim to remedy based on the testimony of a witness now deceased.

B. Notes alleged to have been written by the petitioner were introduced against him at trial. Strong rebuttal testimony and a court instruction severely inhibited any weight the jury may have given the notes despite the opinion of a document examiner that the accused authored them. The petitioner's claim of false evidence rests on opinion testimony and disregards the function of both the jury and expert witness. Due process does not demand the destruction of a conviction where the evidence of fraud is subject to opinion and no knowledge of it may be attributed to the prosecution.

C. The alibi instruction given to the jury created a separate and inferior burden of proof upon the accused but did not overcome presumption of innocence or the clear duty of the jury to acquit him if a reasonable doubt existed. The defendant was not obligated to use the alibi defense, take the witness stand, or present any evidence. The choice of the alibi defense in Iowa carries with it procedural rules consistent with the latitude allowed to the States by the due process clause.

## ARGUMENT

**A. Due process is not denied by suppression of evidence unless the evidence is favorable to the accused and is material either to his guilt or punishment.**

The fact that a requested defense witness was held in jail during the course of petitioner's trial is undisputed. Thomas Orsucci, also known as Thomas Sanders, was imprisoned in the Polk County jail in Des Moines, Iowa, from November 15, 1934, to December 8, 1934 (A. 116-117; H.R. 18-20), and was therefore not present for the petitioner's trial in Burlington, Iowa which began on November 13, 1934, and concluded with a verdict of guilty of murder in the second degree eleven days later. (A. 91; 97). Mr. Orsucci was one of fourteen witnesses requested to be subpoenaed. (A. 92-93). For reason unknown, the service of subpoena was returned stating incorrectly: "Thomas Orsucci is in Clarinda institution for Insane." (A. 125). In 1936 or 1937, petitioner realized the error of the return when he discussed the matter with Orsucci in the penitentiary at Fort Madison, Iowa. (H.R. 34).

The basic rule relied on by the petitioner in support of his allegation of constitutional violation, is that suppression of material evidence favorable to an accused person violates due process. *Brady* v. *Maryland*, 373 U.S. 83. The respondent respectfully submits that the rule in *Brady* is not applicable because Orsucci's testimony, had it been given, would not have been material to the petitioner's guilt or punishment; it is probable that the effect of the testimony would have been harmful rather than favorable; and the petitioner has waived his right to claim suppression by his own lack of diligence.

Petitioner argues that Orsucci's testimony would have been material because of the Iowa law which allows service of subpoenas at the State's expense if the trial court

finds such witness to be "material and necessary" to the defense.[1] Adherence to the petitioner's reasoning certainly leads to easy application but it reaches far beyond the more limited scope of "material to guilt or punishment" enunciated in *Brady* v. *Maryland*, supra. While the lower courts have not viewed the issue of materiality with uniformity, it does seem clear that all evidence admitted at trial (or excluded) need not qualify as evidence material to guilt or punishment.

The recent decision in *United States* v. *Keogh*, 391 F.2d 138 (2nd Cir., 1968), provides an unusually thorough review of "suppression" case law. In the opinion, Judge Friendly distinguishes between "easy" cases where intentional prosecutorial suppression presumes the evidence to be highly material and those where suppression was not deliberate. In defense of a high standard of materiality in the latter type cases the opinion states in pertinent part at 391 F.2d 148:

> "Deliberate prosecutorial misconduct is presumably infrequent, to invalidate convictions in the few cases where this is proved, even on a fairly low showing of materiality, will have a relatively small impact on the desired finality of judgments and will deter conduct undermining the integrity of the judicial system."

While "request" cases were held in the same disrespect as intentional suppression by the prosecutor, the circum-

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1. Section 13880, Iowa Code (1931):

"Witnesses for the defense shall be subpoenaed at the expense of the county only upon the order of the court or judge thereof before which the case is pending, made upon a satisfactory showing that the witnesses are material and necessary for the defense, which order may be made at the time of the trial or other dispositions of the case. The board of supervisors shall not allow any claims for fees of witnesses not thus authorized."

This Section, now numbered 781.2, was recently amended by the legislature when the words "or judge thereof" were stricken from the first sentence. Acts 1967 (62 G.A. Ch. 400).

stances below belie the application of that reasoning to this case because there is no proof of knowledge of suppression by the County Attorney or that the Sheriff's erroneous return was any more than oversight or mistake.

In *United States* v. *Tomaiolo*, 378 F.2d 26, 28 (2nd Cir., 1967); *Link* v. *United States*, 352 F.2d 207, 212 (8th Cir., 1965); and *Coleman* v. *Maxwell*, 273 F.Supp. 275, 280 (S.D. Ohio, 1967), it may be observed that evidence used for impeachment or credibility attack is not always of constitutional magnitude. To be material to the guilt of the petitioner, Orsucci would have had to contribute to the identification of the petitioner near the scene of the crime, something he could have not have done without incriminating himself. Of course, Orsucci could have pointed out that one of the State's identification witnesses was not sure about seeing him the morning of the murder. (H.R. 48-50). But this would prove nothing regarding the petitioner's identification and in effect would have strengthened the testimony of the challenged witness by contrasting his honesty in admitting uncertainty as to one suspect and certainty to the other.

Although the defense had knowledge of what had previously occurred regarding the Orsucci's identification (H.R. 185), a vigorous attempt by counsel to impeach the state's identification witnesses was nearly void of reference to Orsucci. (T.R. 45-64; 84-95). This not only indicates the lack of importance of the subject but also raises serious doubt as to whether impeachment would have been possible had Orsucci been produced.[2]

2. The law is well settled in Iowa that the witness to be impeached must have proper foundation questions asked of him to establish the prior inconsistent statement to be challenged. This rule has been given full effect from before the petitioner's trial up to the present. *Bisgaard* v. *Duvall*, 151 N.W. 1051, 169 Iowa 711 (1915); *State* v. *Pilcher*, 158 N.W.2d 631, 636, ..... Iowa ..... (1968).

The decisions by this Court in *Alcorta* v. *Texas,* 355 U.S. 28 and *Giles* v. *Maryland,* 386 U.S. 66, serve to clarify the difference between the instant case and one in which credibility testimony takes on Fourteenth Amendment protection. In *Alcorta,* the only eyewitness to the killing testified falsely, with the knowledge of the prosecutor. The gap in his credibility was in effect the difference between five years imprisonment and the death penalty for the accused. In *Giles,* the credibility of the prosecutrix was extremely important regarding the key issue of consent in a rape charge. The evidence apparently could have assisted the accused to a complete defense.

In comparison, Orsucci could have done little more than deny his own presence at the Burlington murder, a contention which, even if clearly established would not have exculpated the petitioner. It follows that the testimony desired by the defense from Orsucci cannot unequivocally be presumed to be favorable. His implication in the affair or his personal interest in exoneration could have subjected the weight of his testimony to serious doubt by the jury. A recognition of constitutional right to be free from suppression of favorable evidence is understandable. However, there would be grave cause for concern if that rule were extended to include unfavorable or questionable evidence.

No view of this alleged due process violation would be complete without a consideration of the extraordinary circumstances involved subsequent to the trial. During the years following discovery of the availability of Orsucci, at least five different attorneys represented the petitioner before Orsucci died in 1965. (A. 11, H.R. 39, 51, 52, 54). For over two years petitioner was out of prison but evidently

did not contact Orsucci. (H.R. 94). It also appears that the petitioner was able to spend $2000 obtaining the deposition of another trial witness, Clarence Ruggles, in San Bernardino, California in 1961. (A. 61-62; H.R. 56). Although Orsucci resided in Des Moines, Iowa and occasionally talked with petitioner's brother, Hal J. Johnson (H.R. 125-127), no deposition was obtained of what "pertinent" knowledge Orsucci had, although it was offered "if requested" in 1949. (A. 60). If it may be said that the affidavit represents petitioner's recognition of a right, it should be clear that the right was abandoned by waiting until after Orsucci's death to claim it. Such a conclusion would seem to be in line even with the strict Federal standard. *Johnson* v. *Zerbst,* 304 U.S. 458, 464; *Brookhart* v. *Janis,* 384 U.S. 1, 4. Indeed, the petitioner has frankly admitted before the Federal District Court, ". . . I certainly was negligent in not taking a deposition from the man." (H.R. 56).

Finally, reference to *Washington* v. *Texas,* 388 U.S. 14, reveals why the error of the subpoena return was harmless error under the concept expressed in *Chapman* v. *California,* 386 U.S. 18. In *Washington,* supra, the statute provided a one way street, allowing the State to have testimony refused to the defendant. The Iowa statute only attempts to provide such testimony in spite of indigency. The erroneous return prevented both the defense and the prosecution from securing whatever information Orsucci may have had.

**B. A conviction remains valid unless the challenged evidence is proven false and it was knowingly used by the prosecution.**

State's exhibits one and two in petitioner's 1934 trial were hand printed notes which may be described as being

inculpatory. (A. 126). The use of this additional evidence was strictly in accord with the governing Iowa law.[3] The notice was received six days before trial. (A. 87-90, H.R. 181-182). While the notes were received in July that year, Mr. John A. Dailey, Des Moines County Attorney in 1934, later explained that they had not been submitted to handwriting expert Vernon Faxon until September because "the county was broke" at that time during the Depression. (H.R. 165, 172). Nevertheless, Mr. Dailey made it clear at the habeas corpus hearing that he did not induce the notes to be written, they came as a surprise to him, and in his estimation "the case would have been quite adequate without them." (H.R. 173-174).

This Court has repeatedly scorned the knowing use of false evidence by the prosecution in order to obtain a conviction against an accused. *Miller* v. *Pate,* 386 U.S. 1; *Mooney* v. *Holohan,* 294 U.S. 103. What is perplexing is that petitioner attempts to apply that rule herein where (1) the prosecutor denies knowledge of any fraud, (2) the attack on the reliability of the notes combined with an instruction of the court rendered them useless, and most of all, (3) the validity of the evidence remains a subject of expert speculation.

The petitioner's argument regarding the notes plunges headlong into false evidence consideration after dismiss-

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3. Section 13851, Iowa Code (1931), now 780.10, Iowa Code (1966):

> "The county attorney, in offering the evidence in support of the indictment in the order prescribed in section 780.5, shall not be permitted to introduce any witness who was not examined before a committing magistrate or the grand jury, and the minutes of whose testimony were not presented with the indictment to the court, unless he shall have given to the defendant, or his attorney of record if the defendant be not found within the county, a notice in writing stating the name, place of residence, and occupation of such witness, and the substance of what he expects to prove by him on the trial, at least four days before the commencement of such trial."

ing them in a matter-of-fact fashion as being fraudulent. Even the respondent's habeas corpus evidence is offered as though falsity were conceded. While the analysis by the petitioner's document examiner agrees with the examination made by a state expert, there remains a vast distinction between fact and opinion. No fact concession has been made by the respondent that the notes are false and if such conclusion were stated it would be a questionable admission without direct proof. Although respondent did state below that admission of the notes was incorrect, such statement reflects only the present standard of handwriting analysis technology, not that of 1934 and not that of the future.

The jury system provides great safety from a determination of guilt or innocence by persons specially qualified in some art or science. Ordinarily, jurors, not the experts, arrive at the fact conclusion which determines imprisonment or freedom for an accused. If the jury in the petitioner's 1934 trial could be polled, the remarks would probably provide a textbook example of how an accused may be protected from questionable documentary evidence.

The defense made it quite clear to the jury that the document examiner was only expressing an opinion (T.R. 201), and that the notes may have been manufactured by another prisoner. (A. 108; R. 288). The petitioner's representation led the Federal District Court below to remark that "after reviewing the abstract of record of petitioner's trial, this court is convinced that the record indicates that petitioner's trial counsel, Mr. Doran and Mr. Finley were able, vigorous and persistent in presenting the case for defense." (A. 63).

The trial court gave further aid to the accused by instructing the jury that "while it is proper to consider such

evidence it is proper to remark that it is the lowest order of evidence, or evidence of the most unsatisfactory character."[4] Although the rule of evidence regarding handwriting in Iowa (Section 622.25, Code of Iowa 1966) has been adjusted by judicial decision to keep pace with the advancement of technology,[5] there seems to be no reason to relegate the more recent analysis to a higher plane than that granted to the 1934 opinion.

The petitioner has directed considerable argument toward the proposition that the good faith or bad faith of the prosecution is irrelevant in overturning false evidence cases just as it is in suppression decisions. While we think the complicity issue need not be reached herein without first finding the notes false, it is interesting to note the absence of reference to *Miller* v. *Pate*, 386 U.S. 1, in that argument. *Miller* recently restated the rule which had been articulated by this Court as early as 1935, only a

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4. Instruction 17 stated in its entirety:

"Our statute provides that evidence respecting handwriting may be given by experts by comparison, or by comparison by the jury with writing of the same person which are proved to be genuine. Evidence of this character has been introduced upon this trial, and it is proper for the jury to carefully consider the testimony of the witness and to say how much weight shall be given to such testimony, taking into consideration the amount of experience, knowledge and skill possessed by the witness about the matter concerning which his opinion has been given. But, while it is proper to consider such evidence, it is proper to remark that it is the lowest order of evidence, or evidence of the most unsatisfactory character. However upon this question you will compare the writings in dispute with writing of the defendant which you may find proved to be genuine, and in considering this question and doing this you may and should use your own judgment, from comparison of such writing, with the writings in controversy in determining whether or not the defendant actually wrote such alleged writings; and it is your duty and privilege to give your own comparison and knowledge gained from such comparison such weight as you think it entitled to, in connection with the other evidence admitted upon the trial upon this question." (A. 62, T.R. 375-376)

5. A comprehensive review of attitude by the Iowa Courts regarding expert handwriting testimony over the years may be found in *Cousin* v. *Cousin*, 192 F.2d 377 (8th Cir., 1951).

few weeks after the petitioner's trial. *Mooney* v. *Holohan*, 294 U.S. 103. In *Mooney* and *Miller* the rule against use of false evidence is clearly restricted to "knowing" use by the prosecution. Even if a reasonable interpretation includes agents of the state not directly involved in the trial, the record below is silent regarding any agent of the State having knowledge of the purported falsity of the notes, except for that testimony which was also before the jury. (A. 108; T.R. 309). The County Attorney's presentation of the notes to the jury after first notifying the defendant was a disclosure obviously founded in good faith and fairness. Indeed, if the notes had not been subjected to the scrutiny of the jury, a good argument might reason that such an omission was suppression of evidence violative of due process because their effect might have proven to be crucial to the result of the trial. *Brady* v. *Maryland*, 373 U.S. 83; *Giles* v. *Maryland*, 386 U.S. 66.

**C. An instruction by the trial court which creates an inferior burden of proof on an accused choosing the special defense of alibi does not alter the overriding presumption of innocence.**

According to the very recent decision in *Stump* v. *Bennett*, ..... F.2d ....., (8th Cir., 1968) filed June 27, 1968, the Iowa rules on alibi evidence are unconstitutional. This leaves three basic positions in conflict.

The first contention is expressed by the majority in the *Stump* case, supra, and the minority in the Iowa Supreme Court decision in *State* v. *Stump*, 254 Iowa 1181, 119 N.W.2d 210. In essence, their arguments parallel those of the petitioner herein that an instruction requiring a defendant to assume a burden of proof strikes at the guarantee of presumption of innocence granted by the Constitution.

Another view is represented by the decision below, *Johnson* v. *Bennett*, 386 F.2d 677 (8th Cir., 1968) and the dissent in *Stump* v. *Bennett*, supra. Briefly, the argument states that the alibi instruction is confusing, unnecessary, and unwise but does not represent a violation of constitutional rights.

The third conclusion regarding the Iowa alibi process is included in the majority rulings by the Iowa Supreme Court in *State* v. *Stump*, supra, and *State* v. *Johnson*, 221 Iowa 8, 264 N.W.2d 596. Basically, the reasoning of the court is that alibi represents a special kind of defense on which the State of Iowa may place certain safeguards for the protection of the innocent without making it impossible to convict the guilty. Respondent is persuaded that the long established position of the Iowa Supreme Court represents the most reasonable argument.

The adoption of the majority opinion in the *Stump* decision strikes at the very heart of the jury system and the right of a state to prescribe rules of criminal procedure. It is generally recognized that the necessity for an instruction largely depends on the facts of the case so that each jury may be advised as to the crucial issues. The dissent by Chief Judge Van Oosterhout noted:

> "The Supreme Court, this court and other courts have uniformly held that fragments of instructions should not be considered in isolation but that instructions should fairly be considered as a whole and such principle governs in cases where violations of constitutional rights are asserted. *United States* v. *Gainey*, 380 U.S. 63, 70-71; *Leland* v. *Oregon*, 343 U.S. 790, 795, 800; *McIntosh* v. *United States*, 8 Cir., 341 F.2d 448, 456; *Harding* v. *United States*, 8 Cir., 337 F.2d 254, 257; *Hayes* v. *United States*, 8 Cir., 329 F.2d 209, 218; *Stoneking* v. *United States*, 8 Cir., 232 F.2d 385, 389; *United States* v. *Andreadis*, 2 Cir., 366 F.2d 423, 434; *United States* v. *Senior*, 7 Cir., 274 F.2d 613, 616-17. See 23 A C.J.S. Criminal Law §1321 (1). (2)."

If instructions are to be considered piecemeal against the weight of the authorities, why should the alibi instruction take a special position beyond the scope of the general rule? The presumption that the alibi instruction rises above the others to the prejudice of a defendant ignores reality. As succinctly noted by the separate dissent of Judge Matthes in *Stump* v. *Bennett*:

> "In examining the trial court's comprehensive instructions, I find that the jury was informed on at least twelve different occasions that it was required to determine beyond a reasonable doubt that defendant had committed the offense before it could find him guilty. In this posture, it is inconceivable to me that the defendant was deprived of the presumption of innocence by reason of the alibi instruction. I believe that the jury, presumptively composed of reasonably intelligent persons, understood that all essential elements of the offense had to be established beyond a reasonable doubt. For this reason I am unable to comprehend any rational basis upon which to interfere with the judgment of the state court in this post-conviction proceeding."

The jury below was also informed by several instructions, including the challenged one, that reasonable doubt as to guilt demanded acquittal. (A. 95-96; T.R. 368-381). The evil in overparticularizing review of instructions is that any instruction may be faulty standing alone just as any remark taken out of context may lead to misinterpretation. The alibi instruction does not deserve such special treatment.

The pitfall which beckons those who argue against the wisdom of the alibi instruction is created in part by disregard of the supporting instructions but also an apparent lack of faith in the jurors. Nevertheless, the wisdom of the rule should not occupy a position of importance when con-

sidering the possible violation of constitutional rights any more than the fact that such practice is not followed in most jurisdictions. *Leland* v. *Oregon,* 343 U.S. 790.

Thus, even the intermediate position taken by the minority in *Stump* v. *Bennett,* supra, that the alibi instruction is useless but not unconstitutional makes a value judgment which should be reserved to the state. The Iowa majority notes in the petitioner's direct appeal that "The instructions in this case in regard to the alibi did not go as far as such instructions many times rightfully go." *State* v. *Johnson,* 221 Iowa 8, 20, 264 N.W. 596. If a special distrust of alibi evidence prevails in Iowa, then the procedure used for advising the jury of the fact should not be smothered, regardless of the severity of the standard; unless the presumption of innocence is truly lost.[6]

Much misunderstanding is spread by use of the phrase "shifting the burden." As a basis for finding constitutional violation this is especially unfortunate because it contains a large amount of opinion and no foundation in fact. The burden on the state to prove guilt, if at all, beyond a reasonable doubt, is drummed into the jurors by repeated reference to it in the instructions. Nowhere in the instructions, including the alibi instruction, is the jury told that that overwhelming concept budges, not to mention "shifts." The separate and inferior burden does not shift from anywhere. It arises by the choice of the defendant when he attempts to show he was present in some particular place, rather than rely on the presumption he was anywhere but the place of the crime. If that burden is not reached, the accused falls no further than he himself has climbed. The

6. The United States Supreme Court has often compared the interest of a state and the rights of a defendant in resolving other issues. *Leland* v. *Oregon,* supra; *Giles* v. *Maryland,* 386 U.S. 66; *Chapman* v. *California,* 386 U.S. 18; *Spencer* v. *Texas,* 385 U.S. 554. A critical review of other decisions may be found in *Hyder* v. *Beto,* 270 F.Supp. 46, 50 (N.D. Tex., 1967).

safety net of presumption of innocence is never moved. Again, as in *Leland* v. *Oregon*, 343 U.S. 790, 800, the jury system must be defended from an attempt to degrade its function based on an assumption of inability.

While the reasoning above would seem to be equally applicable to Iowa's procedure and those states with other standards regarding alibi,[7] the opinion in *Stump* v. *Bennett*, raises two further reasons why constitutional error may not be found herein. First, the trial occurred in 1934, and second there was no preservation of constitutional error.

Counsel for petitioner showed a vigor in his trial defense seldom observed in modern practice. Their competence is unquestioned. (H.R. 74). Yet, regardless of their great ability, they could not foresee the constitutional opportunities available in another era. Consequently, the failure to take any exception to the sixteenth instruction both lends weight to a conclusion that no such right existed at that time and that the right is now foreclosed.[8] The

7. The Court of Appeals, 8th Circuit, noted in *Stump* v. *Bennett* that Georgia has a rule similar to Iowa's, and Idaho, West Virginia, Arkansas, Montana, California, and Texas permit "instructions which require a defendant to present sufficient evidence of alibi to establish in the minds of the jurors a reasonable doubt of his guilt but do not at any time shift the burden of persuasion . . . *these states simply shift to the defendant the burden of going forward with the evidence as to the alibi itself.*" (Emphasis ours).

8. Footnote 9 in *Schmerber* v. *California*, 384 U.S. 757, 765, includes the dicta: "Since trial here was conducted after our decision in *Malloy* v. *Hogan*, supra, making those principles applicable to the States, we think petitioner's contention is foreclosed by his failure to object on this ground to the prosecutor's question and statements."

Petitioner's Exception XIII read:

"Defendant excepts to Instruction XVI for the reason that the same does not correctly state the law with reference to the defense of alibi, and the manner and form in which the same was prepared by inference sets out the feeling of the drawer of the instruction (perhaps unconsciously so) that

majority opinion by the Court of Appeals in *Stump* v. *Bennett* has built a very strong argument for finding the right to presumption of innocence existed long before the petitioner's 1934 trial. Included in support of that position are two decisions by this Court, *Coffin* v. *United States,* 156 U.S. 432, 453 (1895) and *Cummings* v. *Missouri,* 4 Wall. 277, 328 (1866). If it may be agreed that the right to presumption of innocence was available in 1934, it follows that the failure to challenge the alibi instruction on that ground should be given serious consideration.

On the other hand, if the applicable constitutional rule has been announced since 1934, e.g. *Morrison* v. *California,* 291 U.S. 82 (1934); *Speiser* v. *Randall,* 357 U.S. 513, 525-26 (1958); then the question arises as to whether the petitioner is entitled to retroactive application of such rule. After consideration of several decisions by this Court, the Court of Appeals apparently adopted the reasoning in *Johnson* v. *New Jersey,* 384 U.S. 719, and *Tehan* v. *Shott,* 382 U.S. 406, in concluding that retroactive application of recently adopted rules would not be available to the petitioner. (A. 82).

Aside from the numerous authorities cited by the petitioner in support of his contention, it is argued that the alibi instruction issue is an original question of constitutional importance. If this is so, then there can be no argument regarding the application of a "new" rule to a chance beneficiary under the principles of *Stovall* v. *Denno,* 388 U.S. 293.

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the evidence of alibi in this case was rather thin and entitled to little weight,—this because of the Court's wording, 'and you are also instructed that you scan the proof of alibi with care and caution, and all of the evidence upon this point both for and against this claim of alibi, should be scrutinized with care and carefully considered by the jury'." (T.R. 395).

Finally, the general issue of whether the alibi instruction may be harmless error according to *Chapman* v. *California,* 386 U.S. 18, cannot be ignored. There is little room to argue that the loss of presumption of innocence could be insignificant. However, if the "error" involved is merely a label attached to the alibi instruction expressing dissatisfaction with its wisdom or wording, then there can be no doubt that it is not an error of Constitutional magnitude. *Chapman* v. *California,* 386 U.S. 18, 24.

## CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be affirmed.

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